

EU employment governance revisited

Citation for published version (APA):

Büttgen, N. (2017). *EU employment governance revisited: Towards an innovative legal framework for employment regulation*. [Doctoral Thesis, Maastricht University]. Datawyse / Universitaire Pers Maastricht. <https://doi.org/10.26481/dis.20171220nb>

Document status and date:

Published: 01/01/2017

DOI:

[10.26481/dis.20171220nb](https://doi.org/10.26481/dis.20171220nb)

Document Version:

Publisher's PDF, also known as Version of record

Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

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9. Executive Summary

Purpose and relevance (Chapter 1)

Today public authorities are facing three current problems in the regulation of employment: non-standard employment, inequality and unemployment. The thesis is interested in how EU level governance addresses these problems given its advanced stage of market and monetary integration, and particularly following the recent experience of financial, economic and monetary crisis.

The EU has tried to establish itself as a “crisis manager” to keep up both its global competitiveness and a sustainable “European Social Model” (MSE). Creating more and better jobs has been one of the main European goals to be achieved by 2020. This thesis approaches this broad ambition from a labour law perspective.

Based on the recognition that labour law has historically been fulfilling a crucial role in balancing social inequalities, we thus seek to assess the EU’s capacity of upholding and promoting workers’ rights in Europe. We conduct a socio-legal study of European employment regulation because of the intermingling of law and policy in this area.

Notably, we review how European employment regulation has developed over the past decade. We build on an inclusive notion of “EU employment governance”, the so-called “integrated regime” thesis. This view emphasises that the EU has an increasingly diverse set of regulatory instruments at its disposal with which it influences employment regulation. It conceives various governance tools (binding rules, policy coordination, and common expenditure) as constituting a “toolkit” operating in an integrated manner, tailored towards achieving the EU’s hybridised employment objectives. In the early 2000s, it had been implicitly assumed that through this *integrated regime of EU employment governance* the interaction of these tools meant the effective achievement of progressive “competitiveness-social justice”-objectives (hereafter the “integrated regime”-thesis).

Given dramatic changes over the last decade, the thesis assesses what capacity the Union (still) has in the field of EU employment governance and evaluate its implications for labour law in Europe. In response to the drastic experiences of financial, economic and monetary crises, the European system of socio-economic governance has been subjected to far-reaching changes. The analysis therefore addresses two main research questions. First, it asks *whether EU employment governance can still be regarded as an integrated regime today*. Second, we examine *to what extent the EU is (still) meeting its employment objectives through the hybrid interaction of different governance instruments*.

Accordingly, we aim both to explain how EU employment governance has developed throughout the past decade (explanatory analysis) and to evaluate the EU’s capacity to uphold and promote workers’ rights in Europe (normative analysis). Therefore, a comprehensive theoretical framework is developed to analyse regime “dynamics” (formation and change) in European governance and study the impact of the “hybridisation” of the Union’s objectives and instruments governing employment matters.

Theoretical background (Chapter 2)

We regard “governance” as a complex process that involves multiple actors pursuing a wide range of substantive and organisational goals, notably, those of the common good. The notion helps thinking about what modalities of control and means of regulation are deployed (where, how and by whom decisions are taken, and is their implementation being executed and reviewed) to achieve common aims at supra-national level. According to the governance idea, the governing of society should be *effective*.

Next to that, based on the varied literature on “regime theory”, we take the notion of a governance “regime” to refer to a type of “institution” (in the sociological sense) that structures cooperation between actors. One way to conceive this is through shared norms and principles, common rules and decision-making procedures. A regime is generally characterised by a distinctive rationale for policy design, identifiable at the level of norms and principles. It is composed of interacting parts, embedded in a reference framework that helps to assess continuity over time.

It is however not easy to accommodate the “governance” idea within legal discourse. In academia, this challenge has been reflected in the difficulties of combining the two schools of EU Constitutionalism and New Governance. To overcome these difficulties, we have recognised that there is a fundamental paradox at the heart of the EU system: The uneasy co-existence of the Union legal order based in limited EU powers and the efficiency-based European policy-making that requires considerable competence and power sharing to deal with increasingly complex regulatory problems. The proliferation of different modes and instruments of governance at EU-level in fact brings to light the Union’s peculiarities and its integration process (such as its multi-level and multi-speed nature and its multi-polar decision-making structures). Adopting a binary approach that conceives different instruments and processes of governance (e.g. ESD, OMC) as distinct from – and, thus, potentially antithetical to – traditional legal regulation can be problematic.

Methodology (Chapter 3)

Instead, it seems more constructive to use a “framework” approach for understanding the law-governance relationship at EU-level. Complemented with the idea of the EU “governance architecture”, this perspective regards EU governance as a broad framework that guides and structures the hybrid interaction between governance instruments, modes and actors. It represents an attempt to fathom the complexity of the Union’s regulatory system and, particularly, to grasp the hybridised influence that European governance emits at the national level.

This approach explicitly recognises the EU’s peculiar post-national context in which the law-governance relationship takes shape, building on a broad notion of law that recognises its dual function. The *constitutional* function captures the law’s capacity of providing a constitutive and legitimizing normative framework. The *instrumental* function focuses on law as a governance instrument. This inclusive view thus facilitates the analytical distinction between conceiving EU governance as a structure (ideational component) and a process (organisational component).

The framework approach then lets us endorse the mutual relevance of law and governance within the EU context. The purpose of the EU governance architecture is to sustain and *enhance governance capacity*. This should ideally mean *mastering the balancing act* between effectiveness and democratic legitimacy in the design of European governance responses to complex, collective problems. This provides the basis for reconceiving the “integrated regime”-thesis as follows: *The EU governance architecture influences European governance capacity in a certain governance area through processes of issue-specific regime formation*. This working hypothesis provides the basis for our analytical framework (see Table 3.2.) for studying the EU governance architecture and regime change.

The “Lisbon 2020” governance architecture (Chapters 4-5)

The broader context of the EU’s socio-economic governance activities is shaped by what we refer to as the “Lisbon 2020”-architecture. This structures the Union’s normative aspirations based on a durable constitutional framework (the Treaties, including the CFREU) and shaped by a more revisable, reflexive framework (Europe 2020) defining its strategic ambitions for the medium-term. This composite normative framework pivots on the core objective of establishing a CSME, making the balanced pursuit of economic and social goals the *raison d’être* of the EU polity.

Within this framework, the delimitation of competences between the EU and the Member States has become more complex. It remains hierarchical relying on the subsidiarity principle. Yet, the Treaty-based allocation of responsibilities between the European and the national level appears increasingly diffuse. The EU’s power of “coordinating” national policies is now recognised as a self-standing competence. Meanwhile, the pursuit of the 2020-objectives requires a partnership-approach that builds on a more organic division of tasks. It presupposes the mutual responsibility of the Member States and the EU institutions towards enhancing European governance capacity.

Importantly, the “Lisbon 2020”-architecture puts up a consistency requirement. The TFEU obliges the Union to ensure *consistency* between its policies and activities, taking into account all of its objectives. Europe 2020 equally guides European policy-making in a deliberately integrative manner. Nonetheless, the Treaty also provides that the promotion and implementation of the broad European objectives must not result in supra-national intervention *ultra vires*.

On that basis, the analysis shows further how following the European anti-crisis reforms a *new integrated regime of EU Economic Governance* has (been) developed within this framework. The main features of this new regime can be summarised as follows:

- a. dense governance arrangements with diverse EU governance tools and techniques interacting in a transformative manner;
- b. strengthened and broadened objectives elaborated through a comprehensive procedural framework aligning that tool-kit; and
- c. an institutional context with much empowered strategic actors – notably, the ECB – favouring a market-driven integration process.

These elements have jointly contributed to enhancing the Union's capacity regarding the achievement of its main economic governance objectives. The resulting transformative interaction between binding and non-binding instruments effectively bestows authoritative force onto the policy guidance (recommendations) advanced through the meta-coordination cycle of the European Semester – especially, in the context of the Euro area (EA). The EU now knows a much-reinforced *coordination capacity* based on benchmarking practices that have been significantly expanded and the *framing* of comprehensive policy narratives throughout the Semester (identifying common problems and solutions).

The *new* integrated regime of EU Economic Governance, centred on the European Semester, unites the operation of two inter-dependent cycles of preventive and corrective economic policy coordination. We argue that this regime currently epitomises the ideal of “integrated coordination” pursued by the “Lisbon 2020”-architecture. Accordingly, we set out to study what implications this new regime has for European employment regulation.

EU employment governance – ideational aspects (Chapter 6)

Having gained an overview of the EU's general governance architecture and an understanding of the significant changes that the European system of economic governance has undergone, we turn to examine *whether EU employment governance can still be regarded as an integrated regime today* and *whether it is effective in reaching the EU's employment goals*. Thereby we also aim to understand better the extent the EU's influence on employment regulation. Based on the analytical framework set out in Chapter 3, we discuss first the ideational component (structural level) of EU employment governance and, then, its organisational component (process level) within the framework of the “Lisbon 2020”-architecture.

Understanding the EU's aspirations regarding employment regulation

To increase our understanding of the Union's policy aspirations regarding employment regulation at present, it is useful to recall the moment that marked the deliberate development of the social dimension of European integration. The 1992 consensus upon which the EU system of socio-economic governance has been built originally included plans for political integration, next to the establishment of the EMU. As the Maastricht Treaty put the monetary union on a concrete roadmap for institutional change, the ambitions for political union remained rather open and vague. Nevertheless, alongside the establishment of the EMU, the EU made its mission to “preserve and develop” the European social model (MSE). Reference to the MSE has since provided shorthand for the promotion and protection of social objectives in the context of European integration.

The EU maintains rather ambitious aspirations regarding employment regulation, but its competences remain divided. Importantly, the EU system is characterised by a partial “floor of rights” in European employment law, while it lacks similar minimum standards regarding social security law and social protection. This obvious gap between ends and means lies at the core of the Union's social model. Hence, one could regard EU

employment regulation as being in a state of crisis (regarding its purpose, impact and legitimacy), as it lacks a straightforward policy agenda or a comprehensive justification for European intervention.

However, the MSE-narrative (i.e. the promotion and protection of social objectives at EU-level) has been constructed in such a way that this discrepancy is *not* considered a constraint. On the contrary, the EU's (limited) legal powers and capacity to coordinate, next to the Member States' prerogative in regulating social matters, constitute part of the model's distinctiveness and Europe's comparative advantage.

European employment regulation in the light of establishing a CSME

The MSE is thus as close as it gets to defining social ambitions at EU-level. In that sense, it has functioned as a connective narrative that has jointly promoted employment and social objectives at EU-level in the face of progressing European economic integration. It has done so by providing a connective narrative to the progressive development of governance tools at European level. Despite increasing obstacles to the prospects of European political integration, the MSE-narrative has thereby proven rather innovative as this diversification of regulatory instruments has helped maintaining employment and social issues on the EU agenda.

On this view, then, the MSE is considered as giving EU employment regulation a sense of direction by emphasising the need for modernisation and the mutual significance of economic and social policies. In that way, it has also underpinned the hybridisation process, described in the previous chapters, which has increasingly blended the Union's aspirations for socio-economic governance. This development is nowadays reflected in the fact that establishing a "competitive social market economy" (CSME) is now a constitutional objective of the EU. Accordingly, this *normative perspective* regards the MSE as providing a purposive rhetorical framework that strives to master the delicate balancing act between respecting the sensitive division of competences between Union and Member States and promoting European social and political integration.

The recognition that the MSE effectively links European employment regulation to the development of the Union's social dimension is considered critical to the functioning of the EU polity. We argue that the MSE-narrative may therefore be able to transcend the normative deficiency that characterises EU employment law, by supporting the advancement of EU employment regulation in a more comprehensive manner. The realisation of the ideal of establishing a CSME, then, is facing important challenges – particularly, regarding the further development of EU employment regulation. For the EU institutions, these challenges are reflected in the critical need to overcome the EU's "social deficit" by putting into operation a "balanced integrated approach" (a "high wage, high productivity" route to competitiveness based on an extensive floor of labour standards).

EU employment governance – organisational aspects (Chapter 7)

Here, we consider how the "Lisbon 2020"-architecture is affecting the EU employment governance instruments, focusing specifically on the (longer-term) consequences of the EU

crisis management. As we examine the regime qualities of European employment governance, we seek to understand better the different channels (and their combined effect), through which the EU nowadays is influencing employment regulation in Europe, and their effectiveness in achieving the common employment objectives. We focus on the Flexicurity-objective due to its significance to labour law. Thereby, we too stay alert to the fact that studying the effectiveness of the EU's hybrid governance objectives is challenging because of their normative vagueness.

The Effectiveness in implementing hybrid objectives

European employment regulation has clearly not seen comparable efforts to those of strengthening EU Economic Governance in previous years. It thus appears at present considerably fragmented across the organisational apparatus of "Lisbon 2020". The associated governance tools fail to reveal sufficient consistency. So, their apparent lack of alignment towards meeting the Union's employment goals hardly allows concluding the continued existence of an integrated regime of EU employment governance.

Under the "Lisbon 2020"-architecture, the EU has seen its influence on employment regulation both *contract* and *expand* throughout the past decade. Despite some endeavours to maintain coherence by adopting an integrated approach, the Union has seen reduced particularly its capacity for safeguarding workers' rights through standard-setting. We observe legislative inertia regarding the adoption of substantive employment rules in the area of policy-making. In the realm of judicial enforcement, it is important to recognise the limitations to the enforceability of the CFREU. And, additionally the political will to legislate on employment matters is being questioned, considering the expansive competitiveness review of the Union's existing employment *acquis* through the Better Regulation agenda.

At the same time, the EU seems to have gained influence concerning those aspects of employment governance now integrated into the European Semester. We analyse this more extensively, considering the effects of the significant reinforcement of the procedural framework conditions for economic governance brought about by the EU crisis management. More precisely, it will be interesting to see how the new EU Economic Governance-regime has affected EU employment governance.

Since EU policy coordination apparently exerts most influence at the ideational level (policy formulation and agenda-setting), the examination centres on the enhanced function of *policy framing* (Chapter 4) that the European Semester has brought about. The analysis therefore focuses on the Commission's Annual Growth Surveys (AGS 2011-2016) as one of the Semester's central evaluation instruments that weaves comprehensive policy narratives connecting commonly identified problems with preferred policy solutions. The AGS thus largely pre-determines the conceptual room for devising European policy recommendations.

Hence, we study how the EU's broader policy aspirations are being further concretised and elaborated at this operational level. For that purpose, the three

components of the following model (introduced in Chapter 6) serve as yardsticks for evaluating the policy frames of the AGS:

Were EU employment governance still to represent an integrated regime today, then it would have to be built on a balanced integrated approach that recognises and jointly promotes: (a) the productive role of labour standards; (b) the mitigating role of employment policy/ALMP in remedying the negative effects of employment regulation; and (c) the reinforcing role of macro-economic policy including both supply- and demand-oriented measures.

On that basis, we examine the policy solutions advocated by the Commission to overcome the common problems identified (instability, competitiveness, unemployment, and governance). Because the European Semester epitomises the idea of *integrated* coordination, we are particularly interested in the implementation of the Flexicurity-objective through the interplay of different governance tools. Accordingly, we *assess the preferred policy solutions in the light of recent case law from the CJEU regarding employment protection* – i.e. on the application of the European legislation dealing with temporary employment

EU employment governance in action – Balanced implementation of Flexicurity?

The analysis reveals how the EU's meta-coordination cycle essentially shapes the *policy space* in which policy-makers define and select their potential courses of actions for implementing the 2020-objectives. The analysis shows how the EU Economic Governance-regime proper is ensuring *consistency* in the interaction and the interpretation of the diverse governance instruments.

The EU employment governance instruments thus seem currently captivated by that new regime, especially those intended for employment policy coordination. They are increasingly re-oriented towards serving the EU Economic Governance objectives. The interpretation of the latter is, in turn, being dominated by rather orthodox views on the relationship between State and market and by actors who favour a market-driven European integration process (i.e. monetary union without political union). The EU Economic Governance-regime thus appears to promote a reductive understanding regarding the integrated approach. The Flexicurity-objective is accordingly placed in an institutional context that actively promotes a narrow vision of labour market flexibility and is rather conducive to deregulation.

Besides this sombre conclusion, we also discuss an alternative scenario, wondering if more positive developments in the European Semester actually reveal a more balanced integrated approach in the making. Here, we consider the propensity of EU law to safeguard workers' interests in light of the "Growth"-objective, both through policy-making and judicial enforcement. Furthermore, we discuss a turning point in the AGS narratives and to what extent this reveals a capacity for institutional learning.

EU socio-economic governance and the integrated regime thesis: How much policy space for governance solutions promoting worker protection? (Chapter 8)

In the introduction, we have recognised that in the regulation of employment, public authorities nowadays are facing three inter-related problems: non-standard employment, inequality and unemployment. The thesis discusses how EU level governance addresses these problems given its advanced stage of market and monetary integration. Specifically, it asks what role the EU can (and should) play for safeguarding and promoting workers' rights in the context of globalised markets and structural unemployment.

How much policy space for solutions promoting worker protection?

Regarding the question to what extent EU employment governance still represents an integrated regime within the “Lisbon 2020” governance architecture, we have demonstrated the emergence of a new EU Economic Governance-regime following the European anti-crisis reforms. The main *locus* of action for EU employment governance has evidently shifted away from the legislative domain. The Union's *acquis* of binding rules defining minimum requirements for worker protection in Europe remains currently rather static. So, EU institutions focus increasingly on the design of labour market reforms in the framework of European policy coordination.

The conclusion then reflects more broadly on how much policy space we encounter at EU-level for solutions that promote worker protection. It revisits the relevance of the EU's post-national setting, i.e. the intricate distribution of competences between the European and the national level, for aspects of socio-economic governance. This highlights the continued tension between the consistency requirement and the EU's competence limitation. As supra-national intervention is increasingly fashioning the functioning of its various governance instruments in a consistent – i.e. integrated – manner, the risk that it is being judged *ultra vires* is certainly not negligible. European employment regulation is accordingly confronted with the new EU Economic Governance-regime, which effectively aligns the interacting instruments to the achievement of the common economic objectives through the European Semester.

In effect, with the growing complexity in the allocation of competences in the EU, the framing function of the *problem definition* is significantly increasing in importance. This is because the legitimisation of policy interventions (i.e. the assignment of competence to act) has turned into a question of “labelling”. More precisely, this implies that determining *the legal authority to regulate a certain issue essentially depends on how the underlying policy problem is framed*. Therefore, public authorities – especially those involved in the Union's practice of meta-coordination – carry a special responsibility regarding the process of *inter-framing* (i.e. promoting governance solutions cutting across various policy areas) and the need for justifying given policy solutions.

Assessing the Union's capacity for employment regulation

The analysis above underlines how EU employment governance is operating in the shadow of the EU Economic Governance-regime. The effect is (as Chapter 7 has shown) that the Union currently seems to face a reduced capacity regarding the achievement of its employment objectives.

This reduced capacity manifests itself, for instance, through a *reductive, functionalist conception of the integrated approach to policy-making*. The latter then is not promoted for its intrinsic value as an inclusive strategy of contributing to the central objective of establishing a CSME. Instead it is presented as a necessary effect from the constraints on national public finances. The consequences of this reductive understanding are, amongst others, reflected in the tense relationship between European social policy and employment policy. They also show in the lack of linkages or even conflicts that characterise the deployment of the EU's employment governance instruments.

Regarding the effectiveness of the EU employment objectives through the operation of the European governance instruments, there is a mixed picture. A higher level of employment, as recommended by EU policy guidance, appears to come at the cost of creating more precarious work relationships. The continuous framing of employment standards as “rigidities” means that EU guidance for policy coordination, in effect, frames employment standards as the problem, not the solution.

Towards an innovative legal framework for employment regulation

Finally, there are indications that the European Semester may represent a powerful platform to address the problem of EU's fundamental problem of the implementation gap. It notably provides the Union with an opportunity to develop its role as a problem-solver vis-à-vis the complex *collective* issues that arise in the pursuit of common objectives.

On that view, it seems futile to address the tension between the EU's competence limitation and the consistency requirement inherent in the European governance architecture as a problem of competence creep. We plead to re-conceive the problem in terms of a *hierarchy of norms* foisted de facto upon the “Lisbon 2020” architecture by the new EU Economic Governance regime to ensure the functioning of the EMU. That hierarchy effectively legitimises EU normative guidance on a broad set of (hybrid) issues relevant to macro-financial and macro-economic stability – even including those issues that may be formally outside the Union's competence if approached from the perspective of a singular policy field.

Considering the role of employment standards in EU meta-coordination, we conclude that the iterative and reflexive set-up of the Semester encourages the EU to develop further its role as a “problem-solver”. Because of the complex division of competences between the EU and the Member States, the framing function of the problem definition has become decisive for determining who will be competent to act and regulate a certain issue.

We suggest that the Union's meta-coordination schedule could therefore provide a fruitful basis for fostering a more dynamic understanding of subsidiarity. This refers to

the idea of providing “active coordination” in determining the capacity for different administrative levels to intervene (based on the rationale of cooperation, rather than that of exclusive allocation).

Such dynamic understanding would have to be grounded in an EU governance architecture that is overall more conducive to the advancement of EU employment regulation. Given its resourcefulness and innovative capacity, the MSE-narrative may (once again) provide a capable complement to address the “social deficit” of the EMU. This could offer the conceptual basis for advancing European employment regulation as part of a balanced integrated approach, one promoted deliberately for its intrinsic value in building a European social market economy.